Filed 6/5/03 In re Arsenio C. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re ARSENIO C., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. ARSENIO C., Defendant and Appellant.	C039524 (Super. Ct. No. JV107599)

Following a contested jurisdiction hearing, the Sacramento County Juvenile Court found that the minor, Arsenio C., was within the provisions of Welfare and Institutions Code section 602 in that he committed seven lewd acts with a child under age 14 (Pen. Code, § 288, subd. (a) -- counts one, two, three, eight, nine, ten and eleven) and committed four acts of attempted sodomy with a child under age 18 (Pen. Code, §§ 286, subd. (b)(1), 664 -- counts four, five, six and seven). The court found by clear and convincing evidence that the 13-year

10-month-old minor knew the wrongfulness of his acts when he committed them. (Pen. Code, § 26.) Following a contested disposition hearing, the minor was adjudged a ward of the juvenile court and committed to the probation department for placement in California.

On appeal, the minor contends (1) his waiver of his *Miranda*[1] rights was not knowing and intelligent, (2) there was insufficient evidence that he understood the wrongfulness of his acts when he committed them, (3) the disposition order was based on factors not supported by the record, and (4) counts four through seven, which were alternatives to counts eight through eleven, should have been dismissed rather than stayed. We affirm the judgment.

FACTS

The minor is the nephew of Mr. and Mrs. W., who have had care and custody of the minor from shortly after his birth. For convenience, we shall refer to Mr. and Mrs. W. as the minor's father and mother. Mrs. W. is the mother of Tiffany E. Tiffany is the mother of Jaheed E., the victim.

On January 29, 2001, Jaheed, then six years old, told Tiffany that the minor put Jaheed's "privates" in the minor's mouth, made Jaheed put his mouth on the minor's privates, and put the minor's privates in Jaheed's butt. Tiffany immediately

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[1] *Miranda* v. *Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694].

confronted the minor regarding Jaheed's statement. She made calls to the police over the next several days.

Jaheed was "off track," or out of school, from December 2000 through January 29, 2001. In December 2000, the minor visited Jaheed at his home in Stockton. During the visit, the minor attempted an act of sodomy on Jaheed. Jaheed also visited the minor at his home in Sacramento during the off track period. There, the minor attempted four acts of sodomy, in which he tried to insert his penis into Jaheed's anus. Jaheed felt pain during at least one attempt, although the minor's penis "did not touch the butt hole."

The minor also engaged in at least two acts of oral copulation with Jaheed. During one act, Jaheed fled to another room but the minor followed. When the minor again tried to put his penis in Jaheed's mouth, Jaheed told the minor to stop because Jaheed's sister was coming into the room. The minor tried to put his penis in the sister's mouth but Jaheed held him back.

The minor initiated some of these acts while he and Jaheed were watching television, either cartoons or "nasty" movies chosen by the minor. Jaheed described nasty movies as those involving sexual activity. After watching television, the minor would pull down Jaheed's clothing and underwear and attempt to sodomize Jaheed. Jaheed was able to see the minor's erect penis during some of these incidents. The minor had previously touched Jaheed in an inappropriate manner while Jaheed was living in Pittsburgh.

Jaheed admitted that when he was five years old and living in Pittsburgh, he put his penis in the vagina of the minor's sister. He did this at her direction. At about this time, Jaheed engaged in acts of sodomy with a friend somewhat younger than he was.

On February 2, 2001, the minor admitted to Sacramento Police Officer Nichols that he and Jaheed did some "nasty things," specifically, performing oral sex on each other. The minor also described a previous incident in Pittsburgh where Jaheed pulled down his pants and asked the minor to suck Jaheed's penis. The minor admitted to two separate instances of sexual activity.

The minor told Nichols that while he and Jaheed were in the minor's bedroom on approximately January 27, 2001, Jaheed asked the minor if he wanted to do nasty things with him. The minor related that, while he was lying face down on a bed, Jaheed climbed onto the minor's back and began rubbing his penis on the minor's buttocks. The minor then switched places with Jaheed, and inserted his penis into Jaheed's anus. The minor wanted to continue, because it felt good. However, he stopped after three seconds because he thought he heard the sound of his father's truck pulling into the driveway. He looked out the window and saw that his father was home.

The minor's father testified that he never witnessed any act of sodomy between Jaheed and the minor. The father denied ever speaking to the minor or instructing him on sexual matters. The father testified Jaheed and Tiffany had lived in his home

with the minor during January 2001. Jaheed never reported any sexual touching between him and the minor.

The minor's mother testified Jaheed and Tiffany had been living in the home with the minor during January 2001. She testified that, prior to January 29, 2001, she had not discussed sexual matters with the minor and Jaheed had not disclosed any sexual activities.

DISCUSSION

I

The minor contends his waiver of his *Miranda* rights before conversing with Officer Nichols was not knowing or intelligent. He argues the juvenile court used the wrong standard when evaluating the waiver; and a child of his age, experience and development would have felt the circumstances to be coercive and the *Miranda* advisement meaningless. We are not persuaded.

Background

Officer Nichols, the minor and his mother testified on the *Miranda* issue. Nichols testified that on the evening of February 2, 2001, he entered the minor's residence and located him in the master bedroom. Nichols asked the minor to come and speak with him and the minor said, "sure." Nichols asked the minor to step outside to his patrol car. The minor responded, "okay," and walked outside ahead of Nichols. Nichols sat in the front seat and the minor sat in the rear seat. Nichols read a *Miranda* advisement from a card, and the minor either said "yeah" or nodded his assent when asked if he understood each right. The minor did not appear to be ill or under the influence. He

was not handcuffed during the interrogation. Nichols made no threats or promises. His gun was holstered. He "explained every right and made sure that [the minor] understood before [he] went to the next one." After about 15 minutes of interrogation, Nichols left the patrol car and conferred with another officer; when he returned to the car, he continued the interrogation for about 15 more minutes. The minor never asked to speak with his parents.

The minor testified that he was a seventh grade special education student. Nichols advised him, "[Y]ou have the right to remain silent" and "anything [you] do or say can be held against [you] in the court." Although he did not understand what these advisements meant, the minor did not ask Nichols any questions about his rights. Nichols advised the minor that he had "the right to the presence of an attorney before and during questioning," but the minor did not know what that meant. He did not know what an attorney was, or what a lawyer was. Nichols told him if he could not afford an attorney, the court would appoint an attorney for him or give him an attorney free of charge. The minor did not recall Nichols asking whether, having the *Miranda* rights in mind, the minor would like to tell anything to the officer.

The minor testified that he did not ask to speak to his parents and was not advised that he could do so. He believed he could not talk to his mother because he overheard police telling her in a "high pitched voice" to go "back in" the house. The minor heard this even though the patrol car's windows were up.

The minor testified he answered Nichols's questions because Nichols "told [the minor] to tell him what happened with [the minor] and Jaheed." The minor thought he "had to" do so. The minor was sad and scared, but he did not tell Nichols how he felt.

The minor's mother testified that the minor had been a special education student since first grade, although his middle school classes were not openly labeled as such. The minor had learning difficulties with vocabulary and telling time. He did not always admit when he did not understand things. He was late in reaching developmental milestones.

The juvenile court found that Officer Nichols specifically and carefully advised the minor of his *Miranda* rights. Although the minor had difficulty understanding certain words in the abstract, he understood words in context and knew the gist of the trial proceedings. Although the minor claimed to be unfamiliar with his *Miranda* rights, he was able to recite his right to remain silent word for word and agreed that advisements of his other rights were given. Although he claimed he had not asked Nichols to explain the rights he did not understand, he "had no hesitancy" at trial in asking both counsels to repeat questions and to state that he did not understand. The minor knew that "giving a statement" could result in his being "put . . . in jail." The court found the minor's claims of ignorance regarding specific questions that were asked were not credible. It also found that, even in the minor's version, the format was not coercive. The court ruled that, by a preponderance of

evidence, the minor had understood his rights and had voluntarily waived them.

Analysis

"To establish a valid waiver of an accused person's right to counsel and to remain silent, the People must show, by a preponderance of the evidence, that the accused voluntarily, knowingly and intelligently waived such rights. [Citations.] The court determines the validity of the waiver from an evaluation of the totality of the circumstances. [Citation.] 'This totality-of-the-circumstances approach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved.' [Citation.]" (*In re Bonnie H.* (1997) 56 Cal.App.4th 563, 577; see *Fare v. Michael C.* (1979) 442 U.S. 707, 725 [61 L.Ed.2d 197, 212].) By examining the totality of circumstances, the juvenile court can evaluate whether the minor has the capacity to understand the warnings given, the nature of his Fifth Amendment rights, and the consequences of waiving those rights. (*Fare v. Michael C., supra*, at p. 725; *In re Bonnie H., supra*, at p. 577.) Relevant considerations for the juvenile court include the minor's maturity, education, physical condition and mental health, plus "the crucial element of police coercion, the length of the interrogation, its location, [and] its continuity," however, no single factor is dispositive. (*Withrow v. Williams* (1993) 507 U.S. 680, 693-694 [123 L.Ed.2d 407, 420], citations omitted; *Arizona v. Fulminante* (1991) 499 U.S. 279, 285-286 [113 L.Ed.2d 302, 315].)

"Generally, when reviewing a trial court's decision that a statement was obtained in violation of *Miranda*, we 'defer to the trial court's resolution of disputed facts, including the credibility of witnesses, if that resolution is supported by substantial evidence. [Citation.] Considering those facts, as found, together with the undisputed facts, we independently determine whether the challenged statement was obtained in violation of *Miranda*'s rules.' [Citation.]" (*People v. Farnam* (2002) 28 Cal.4th 107, 178.)

We first consider the minor's claim that the juvenile court "utilized the wrong standard in determining that [he] had knowingly and voluntarily waived his rights." According to the minor, the court "announced that the same standards apply to juveniles [and] adults regarding the voluntariness of confessions," when in fact the "same standards do not apply to the confessions of adults and children." We disagree.

The juvenile court acknowledged that "there have been cases from time to time" on the issue of application of Fifth Amendment principles to minors as distinguished from adults. However, the courts "have not indicated that there are two different *Miranda* rules"; rather, "there's but a single rule which is that there are several rights that must be told to the minor or defendant, arrested person, and [] the rule is the same for adults and juvenile[s] . . . ." Specifically, "we have to be careful to look for either direct or indirect signs that the person intends to invoke that right to remain silent and to avoid any further questioning and to scrupulously honor any

decision that's made by the person to stop the questioning." The court said, in effect, that it would consider the totality of circumstances, which is the proper standard for juvenile offenders. (*In re Bonnie H., supra,* 56 Cal.App.4th at p. 577; see *Fare v. Michael C., supra,* 442 U.S. at p. 725.) There was no error.

The totality of present circumstances does not show that the minor's confession was coerced or involuntary. The record does not show that Tiffany had been "threatening [the minor] over the telephone for three days," as he now claims. Nor does it show that Tiffany was yelling outside the police car at the time Nichols delivered the *Miranda* advisement. Because, by all accounts, the minor was advised of his right to remain silent, the court could find that his purported belief that he "had to answer the police officer's questions" was not credible. Although the minor's school grades consisted of D's and F's, the court properly deduced from his asking for repetition of questions and stating "I don't understand" that he was capable of expressing any lack of understanding of the "fairly straight forward" *Miranda* advisements.

This case is not like *Gallegos v. Colorado* (1962) 370 U.S. 49 [8 L.Ed.2d 325], on which the minor relies. In *Gallegos*, the 14-year-old minor confessed during a five-day detention in which his mother tried unsuccessfully to see him and he had no contact with any lawyer or adult advisor. The court explained that the "five-day detention" gave the case "an ominous cast," which is not present in this case, in which the minor was detained for

only half an hour. (*Id.* at p. 54.) Moreover, the *Gallegos* court's concern that, without adult advice, "a 14-year-old boy would not be able to know . . . such constitutional rights as he had," is not implicated in post-*Miranda* cases where the officer carefully advises the defendant of his constitutional rights. (*Ibid*.)

Nor is this case similar to *Haley v. Ohio* (1948) 332 U.S. 596 [92 L.Ed. 224], in which a 15-year-old boy was arrested at midnight and interrogated for five straight hours by five or six officers in relays of one or two officers at a time. At 5:00 a.m., after being falsely told that two other boys had implicated him, the minor confessed. (*Id.* at p. 598.) He was then held for three more days before being charged while his mother and an attorney she had retained were rebuffed in attempts to see him. (*Ibid*.) The Supreme Court found this confession involuntary because "[t]he age of petitioner, the hours when he was grilled, the duration of his quizzing, the fact that he had no friend or counsel to advise him, the callous attitude of the police towards his rights combine to convince us that this was a confession wrung from a child by means which the law should not sanction." (*Id*. at pp. 600-601.) Here, in contrast, a single officer interrogated the minor for a half hour one evening; the officer did not furnish any false information or rebuff any adult's attempt to see the minor.

Finally, the minor's reliance on *U.S. ex rel. Hardaway v. Young* (N.D. Ill. 2001) 162 F.Supp.2d 1005 is misplaced because

the case has been reversed on appeal. (*Hardaway v. Young* (7th Cir. 2002) 302 F.3d 757.)

II

The minor contends the juvenile court's finding that "there is clear and convincing evidence that the minor knew that each of these 11 acts were wrong" is not supported by substantial evidence. We are not persuaded.

"Penal Code section 26 articulates a presumption that a minor under the age of 14 is incapable of committing a crime. [Citation.] To defeat the presumption, the People must show by 'clear proof' that at the time the minor committed the charged act, he or she knew of its wrongfulness." (*In re Manuel L.* (1994) 7 Cal.4th 229, 231-232, fn. omitted.)

"Although a minor's knowledge of wrongfulness may not be inferred from the commission of the act itself, 'the attendant circumstances of the crime, such as its preparation, the particular method of its commission, and its concealment' may be considered. [Citation.] Moreover, a minor's 'age is a basic and important consideration [citation], and, as recognized by the common law, it is only reasonable to expect that generally the older a child gets and the closer [he] approaches the age of 14, the more likely it is that [he] appreciates the wrongfulness of [his] acts.' [Citation.]" (*People v. Lewis* (2001) 26 Cal.4th 334, 378.)

The reviewing court views the evidence in the light most favorable to the judgment and presumes the existence of every fact the trier may deduce from the evidence. The court

determines whether substantial evidence supports the finding that the minor knew the wrongfulness of his conduct at the time of its commission. (*People v. Lewis*, *supra*, 26 Cal.4th at p. 379.)

In this case the minor, who was seven months shy of age 14, told Officer Nichols that he and Jaheed had done "nasty things." The minor explained that the "nasty things" were "[giving] oral sex to each other."[2] The minor admitted that he concealed an act of sodomy by ceasing his activity when he heard his father arrive home.[3] When interrogated, the minor asked Officer Nichols whether he would be arrested for his conduct.

The juvenile court was not required to conclude that the minor did not know the wrongfulness of his acts until Tiffany questioned him about them, or until police officers arrived at his house, or until Officer Nichols interrogated him in the

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[2] The minor cites a web site <http://www.MP3.com> for the proposition that, "in the current teenage lexicon," the term "nasty" does not necessarily "connote sex involving wrongdoing." However, the minor expressly defined "nasty things" as oral sex between minors. Because he gave the word that specific connotation, we need not consider whether other exculpatory connotations are possible.

[3] The minor contends the cessation of activity could reasonably connote a desire for privacy, as opposed to knowledge of wrongfulness. However, "'[i]f the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.'" (*People v. Perez* (1992) 2 Cal.4th 1117, 1124, quoting *People v. Bean* (1988) 46 Cal.3d 919, 933; see *People v. Ceja* (1993) 4 Cal.4th 1134, 1139.)

patrol car. Rather, the court could deduce from all the evidence, including his furtive behavior during an act of sodomy, that he understood the acts' wrongfulness at the time he committed them. The finding of knowledge is supported by sufficient evidence. (*People v. Lewis, supra*, 26 Cal.4th at p. 379.)

III

The minor contends the juvenile court's dispositional order removing him from his parents' home is not supported by the record and must be reversed. We disagree.

The juvenile court must consider "the broadest range of information pertinent to the ward" when "deciding the level of 'physical confinement' to be imposed pursuant to [Welfare and Institutions Code' section 726." (*In re Jimmy P.* (1996) 50 Cal.App.4th 1679, 1684-1685; see *In re Robert H.* (2002) 96 Cal.App.4th 1317, 1329; Welf. & Inst. Code, § 725.5; further statutory references in this part are to the Welfare and Institutions Code.) The court must find at least one of three facts before ordering removal of a minor from a parent's physical custody. (§ 726; see *In re Jose H.* (2000) 77 Cal.App.4th 1090, 1100.)[4]

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[4] Former section 726 provided in relevant part: "[N]o ward . . . shall be taken from the physical custody of a parent or guardian unless upon the hearing the court finds one of the following facts: [¶] (a) That the parent or guardian is incapable of providing or has failed or neglected to provide proper maintenance, training, and education for the minor. [¶] . . . [¶] (c) That the welfare of the minor requires that

In this case, the juvenile court made two findings under section 726: the parents are not capable of and have failed to provide the proper maintenance, training and education for the minor, and his continuance in the parents' home would be contrary to his welfare.

The juvenile court observed that, during much of the contested jurisdiction hearing, it was "difficult to tell" whether the matter was a "juvenile molest trial" or a "family law matter where a family was in dispute with itself." The court noted the efforts by the minor's parents at the jurisdiction hearing to "disparage" Tiffany and prove her "to be a liar." The efforts were successful and the court found it could "not rely upon [Tiffany's] testimony" because it "cannot trust her."[5] Nevertheless, the parents' effort surprised the court because there was no reason for it. The parents admitted at disposition that, prior to the jurisdiction hearing, the minor had acknowledged to them that Jaheed's allegations were true. Thus, there was "no excuse" for the "distraction" of attacking Tiffany. The court stated, "[e]veryone gets so up set [*sic*], they come in and they want to attack [Tiffany] when she had nothing to do with" the molestations in this case. The

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custody be taken from the minor's parent or guardian." (Stats. 1994, ch. 181, § 1, p. 1668.)

[5] The probation report recommended out-of-home placement, based in part on Tiffany's allegation that the minor's father had molested her. However, the juvenile court made plain that it "wouldn't begin to try to decide" whether Tiffany had been molested.

efforts persuaded the court the family was dysfunctional. The court also expressed concern about the great degree of insight the minor had displayed regarding molestations' effects upon its victims. The minor "knows a little bit too much about the affect of being molested," knowledge the court had not "ever seen from a kid before." It could not see how the minor would develop such insight other than "from personal knowledge," which "also reflects on the general family dynamic."[6] The court concluded: "The home is not the appropriate place for the minor right now because of the depth of these problems and the difficulty . . . the parents are going to have dealing with them. At the very least, in view of all the things [the minor] did over an extended period of time, in Sacramento, Stockton and Pittsburgh, and [the minor's sister] doing it, too, the parents are not recognizing the signs that might be out there as clues to what's going on and are unable to supervise completely the kind of things that would prevent this. They lost control of [Tiffany] at about -- just a little older than [the minor and I am] afraid that that could happen with these kids, too."

In making the foregoing disposition, the juvenile court properly considered the broadest range of information in the record, including the gravity of the offenses, and the parents'

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[6] The minor appears to contend this conclusion is "not supported by any credible evidence." We disagree; the conclusion is a permissible inference from the minor's statements. Contrary to the minor's argument, nothing in *In re Gladys R.* (1970) 1 Cal.3d 855 suggests that delinquency proceedings are inappropriate where the perpetrator was previously a victim.

ability to provide for and protect the minor. (*In re Robert H., supra,* 96 Cal.App.4th at p. 1329.) The minor's claim the finding of parental unfitness "was not supported by any evidence admitted at the hearings" disregards the overwhelming evidence of family dysfunction and has no merit.

The minor claims the juvenile court "considered as part of the disposition the fact that [the minor] exercised his right to a contested hearing." The claim is based on the court's examination of the minor's father regarding his conversations with the minor. The court asked the father, "Did [the minor] say anything to you as to about why he was going to trial rather [than] just admit it in court if he had already admit[ted] it to you?" The father first answered, "Yeah," then explained he did not "have a very good memory," and finally stated, "I don't recall him saying anything." The court later asked, "He never talked about getting it over with by coming into court and admitting he did it rather than going to trial and having the child testify? He never talked about that?" The father responded, "He didn't know anything about that to discuss it with us, Your Honor."

The juvenile court did not return to this theme when announcing the reasons for its disposition. Nothing in the record suggests the court silently punished the minor for requesting a contested jurisdiction hearing. The judgment is presumed correct, and error must be affirmatively shown. (*People v. Brown* (1988) 204 Cal.App.3d 1444, 1451.) No error appears.

IV

The minor contends counts four, five, six and seven should have been dismissed, rather than stayed pursuant to Penal Code section 654. We disagree.

Background

The amended petition alleged, in counts four, five, six and seven, attempted sodomy on a minor (Pen. Code, § 286, subd. (b)(1)), and in counts eight, nine, ten and eleven, lewd acts on a child under age 14 (Pen. Code, § 288, subd. (a)). Following colloquy with counsel, the juvenile court noted that "Counts Eight, Nine, Ten and Eleven are merely alternative statements of Counts . . . Four, Five, Six and Seven . . . ."

At the conclusion of the jurisdiction hearing, the juvenile court stated, "As to Counts Eight, Nine, Ten and Eleven, they are merely restatements of Counts Four through Seven. They only require touching of one part of the body to another part of the body with that lewd intent, which I have found, and, therefore, they are equally as true."

At disposition, the juvenile court stated: "I think I previously indicated that I believe . . . Counts Four, Five, Six and Seven are all in the same course of conduct and alternative statements to Counts Eight, Nine, Ten and Eleven, and, therefore, those counts, Four, Five, Six and Seven, will not receive any additional confinement time because they are governed by Penal Code Section 654."

Analysis

The minor's argument is based on *People v. Johnson* (2002) 28 Cal.4th 240, in which the court's task was "to interpret section 288.5, subdivision (c)'s requirement that '[n]o other felony sex offense involving the same victim may be charged in the same proceeding with a charge under this section unless the other charged offense . . . is charged in the alternative.'" (*Id.* at p. 244.) The Supreme Court affirmed the decision of the Court of Appeal, which had "found the language of section 288.5, subdivision (c) 'clear and unambiguous. On its face, [the statute] prohibits the prosecution from charging the defendant with a violation of section 288.5 and any other sexual felony occurring during the same time period, unless the offenses are charged in the alternative. *In other words, the defendant cannot be convicted of both continuous sexual abuse and the individual underlying acts of that abuse*.'" (*Id.* at pp. 244-245, italics omitted and added.) The Supreme Court explained that, "[i]n explicitly requiring that continuous sexual abuse and specific sexual offenses be charged in the alternative, section 288.5 essentially carves out an exception to [Penal Code] section 954's general rule permitting joinder of related charges. (*Id.* at p. 246.)

In this case, the minor was not charged with violating section 288.5, and no statute directs that he "cannot be convicted of both" attempted sodomy and lewd conduct. (*People v. Johnson*, *supra*, 28 Cal.4th at p. 245.) However, the minor contends *Johnson* applies by analogy because the prosecutor

expressly stated that the charges were "in the alternative." We disagree.

The present case was tried before *Johnson* was decided. Nothing in the record suggests the prosecutor used the phrase, "in the alternative" in the sense employed by section 288.5 and *Johnson*, which is that the minor may not be convicted of both "alternative" offenses. Rather, the context suggests the prosecutor used the phrase in the way the juvenile court understood it, as meaning the offenses arose from the same physical act and may not both be punished. Neither counsel asked the court to apply the phrase as the minor now suggests. The minor's analogy to *Johnson* is not persuasive.

DISPOSITION

The judgment is affirmed.

NICHOLSON, J.

We concur:

DAVIS, Acting P.J.

HULL, J.